IN THE

Supreme Court of the United States

October Term, 1962

No. 58

RUDOLPH LOMBARD, ET AL.,

Petitioners,

vs.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONERS

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Opinion Below

The opinion of the Supreme Court of Louisiana is reported at 241 La. 958, 132 So. 2d 860, under the name of *State* v. *Goldfinch, et al.* The judgment of the Criminal District Court, Parish of Orleans, overruling the petitioners' motion to quash is in the printed transcript at page 28. No written or oral reasons were given by the trial judge when he found the defendants guilty.

Jurisdiction

The judgment of the Supreme Court of Louisiana was entered on June 29, 1961. Rehearing was refused on October 4, 1961. The petition for a writ of certiorari was filed on December 29, 1961, and was granted on June 25, 1962. The jurisdiction of this Court rests on 28 U. S. C. §1257(3), petitioners claiming rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Whether petitioners were deprived, because of various acts of the state described below, of equal protection of the laws guaranteed by the fourteenth amendment.

2. Whether the conviction of petitioners herein violated due process.

3. Whether the decision of the Supreme Court of Louisiana as to the Louisiana statute should be reversed and the conviction of petitioners be set aside.

4. Whether the conviction of petitioners herein denied them the guarantees of free speech provided in the fourteenth and first amendments.

5. Whether the right of a private property holder to call upon the public force is limited by the fourteenth amendment.

Statutory and Constitutional Provisions Involved

1. The Fourteenth Amendment to the Constitution of the United States.

2. The Louisiana statutory provision involved is LSA-R.S. 14:59 (6):

> "Criminal mischief is the intentional performance of any of the following acts: * * *
>
> "(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.
>
> "Whoever commits the crime of criminal mischief shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

Statement

A: Facts:

On September 17, 1960, the petitioners, three Negroes and one white, in an orderly and quiet manner (R. 105, 108), at approximately 10:30 a.m., requested that they be served at a refreshment bar hitherto reserved for whites in McCrory's Five and Ten Cent Store, New Orleans, Louisiana. Because three were Negroes, all were refused service at the bar (R. 105, 113).

The continued presence at the "white" counter of the petitioners, after being informed that there was a "colored" counter (R. 111) was considered by Mr. Graves, restaurant manager, as an "unusual circumstance" (R. 105), or an

"emergency" (R. 105, 106); hence he ordered the counter closed down (R. 105) and called the police (R. 106). At no time did he ask petitioners to leave the *store* (R. 135, 136, 137).

After the police arrived on the scene, Captain Lucien Cutrera of the New Orleans Police Department advised Mr. Wendell Barrett, the store manager, to tell the petitioners in his presence that the department was closed and to request them to leave the department; Barrett followed the Captain's advice (R. 113, 126). When they did not answer or comply with the request, Major Edward Reuther, of the New Orleans Police Department, ordered petitioners to leave the store within one minute (R. 129).

Reuther testified that first he interrogated the petitioners as to the reason for their presence, and asked "who was the leader?". After being told that they were going to sit there until they were served (R. 116), the petitioners were placed under arrest (R. 129), charged and convicted under LSA-R.S. 14:59 (6). They were each sentenced to pay a fine of $350.00 and to imprisonment in Parish Prison for sixty days and upon default of the payment of fine to imprisonment for an additional sixty days.

McCrory's is made up of approximately twenty departments (R. 120) and open to the general public (R. 19). Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter that seats 53, a refreshment bar that seats 24 and two stand-up counters (R. 104). All of the eating facilities are segregated. There are no signs indicating whether service at any particular counter is limited to either Negro or white (R. 110).

The store's segregation policy is determined by local tradition, law and custom, as interpreted by the manager (R. 21). The manager, Mr. Barrett, testified that his decisions relative to segregated lunch counters within the store conform to state policy, practice and custom (R. 25).

One week prior to the arrests herein, the Superintendent of Police of New Orleans stated that his department would "take prompt and effective action" against persons involved in any such activity as described above (R. 139-140).

Four days before petitioners were arrested, the Mayor of the City of New Orleans made known that he had instructed the Superintendent of Police that no such acts would "be permitted", and directed that they be prohibited by the police department (R. 138-139).

B. The Actions Below:

The case was prosecuted in the Criminal District Court for the Parish of Orleans.

Upon the trial, of the five witnesses for the prosecution, three were police officers. The Court refused to permit introduction of testimony, however, as to the cooperation of the store officials and the police officers (R. 23, 24, 127).

At the conclusion of the trial petitioners were found guilty and sentenced; no opinion was filed.

Motions for a new trial were made and denied. The matter was appealed to the Supreme Court of Louisiana, where the convictions were affirmed and rehearing denied. Application for stay of execution for sixty (60) days was granted by the Chief Justice of the Louisiana Supreme Court on October 6, 1961.

Summary of Argument

I. Petitioners, three Negroes and one white, were arrested and convicted of the crime of "criminal mischief" by the State of Louisiana for participating in a protest against discriminatory treatment by retail establishments which permitted Negroes to spend their money freely at all but the "white" lunch counters. The arrests followed efforts of petitioners to obtain service at the white counter and their refusal to move to the food counter reserved for Negroes.

The officials of the City of New Orleans, the police of that City and the Courts, all cooperated in an effort to convert a lawful act into a crime. Whatever their avowed purpose, their intent was clear—to perpetuate the local custom of segregation of Negroes.

As a result of the involvement of the state, through its various agencies, it is clear that there is no validity in a claim that the state merely acted in aid of a private property owner in the protection of his property rights.

II. It is urged that this Court reverse the decision of the Courts below. The opinion of the Supreme Court of Louisiana is based upon an unconstitutional interpretation of the statute which formed the basis for the charges against petitioners. By its decision, the Supreme Court of Louisiana imputed to the Legislature of Louisiana state support and encouragement for acts of improper discrimination. Nothing in the statute warrants such an interpretation. Since it has been read into the statute by the Courts below, and since no evidence upon which petitioners could have been convicted under a reading of the statute con-

sistent with the Constitution of the United States was adduced at the trial, the decision must be reversed.

III. The public force was called herein, presumably in aid of a private property right. The Courts below erred in not finding that such public force had been used to an extent not permissible under the Fourteenth Amendment. While property rights are created and enforced by the State, protection of property interests by the State may not be for a purpose in violation of the equal protection clause.

IV. The acts of petitioners, peaceful, but meaningful, were an act of silent speech, a protest against segregation of Negroes.

Petitioners were protesting on property open to the public. Since they were in no way disorderly, the arrests by the police constituted an improper inhibition upon speech in violation of the Fourteenth and First Amendments.

V. Under Louisiana law, restaurants are a business requiring a license and thus are affected with a public interest. At no time were petitioners disorderly; admittedly, the only act from which their arrests stemmed was a refusal to move on to the Negro counter. In businesses affected with such a public purpose, although they are labelled "private property" it is improper for the state to enforce segregation of Negroes.

VI. Petitioners endeavored, upon trial, to offer testimony showing the concert of action between the store proprietor and public officials in Louisiana. Such testimony would have tended to show direct state participation in the acts of discrimination. That testimony was refused by the Court, thus denying due process of law to petitioners.

ARGUMENT

POINT I

State action has denied petitioners equal protection under the law through the acts of the manager of McCrory's, the police, the prosecutors, and the courts, and through the mayor, the legislature and custom.

A. The Principle of *Shelley* v. *Kraemer* applies in this case.

The law as enunciated in *Shelley* v. *Kraemer*, 334 U. S. 1, is applicable to the case at bar.

In that case the aid of the Missouri and Michigan courts was sought to enforce a restrictive covenant discriminating against Negroes. In its opinion, judicial functions were described as action of the state by this Court; accordingly, the interventions by the state courts upholding such covenants through injunctive relief were set aside as being a denial of equal protection of the laws.

As in *Shelley*, in the case at bar, the assistance of the state has been sought to maintain a whites only policy and to prevent Negroes from receiving equal treatment.

Affirmed in the *Shelley* case, *supra*, was the view expressed in the Civil Rights Cases 109 U. S. 3, that private acts of discrimination were not inhibited by the Fourteenth Amendment, the Court specifically saying that voluntary adherence to the restrictive covenants did not violate the Fourteenth Amendment. But the intervention of the state judiciary was sufficiently the act of the state to set aside enforcement of the covenant relied upon its purported beneficiaries.

As applied to the case at bar the voluntary adherence doctrine referred to in the *Shelley* case, would presumably be limited to the act of McCrory's in setting up its discriminatory pattern of food service, and asking its customers, in effect, to accept this pattern.

But such are not the facts before us. As in *Shelley*, the assistance of the state has been sought to maintain a whites only policy and to prevent Negroes from receiving equal service, a policy announced, fostered and protected by the state. The concern is not with the right of McCrory's to set up voluntarily a whites only counter; it is with the state participation in its maintenance, and in forcing the public to accept the pattern.

That the seeker of legal relief in *Shelley* was, in a certain sense, a stranger to the immediate sale and purchase of land, whereas before us, the owner of the facility, McCrory's, sought the relief, is of little moment. In each case the aid of the state was sought; in fact, as the record demonstrates, the state participation was greater in the case before us than in *Shelley* v. *Kraemer*. It is the action *of the State* in support of private discrimination which makes for the violation of the Fourteenth Amendment and not the name or character of the litigants involved. We submit that state action to deny due process and equal protection was present in the instant case in several forms.

B. The State Actively Intervened Herein, in That It Encouraged and Adopted Unto Itself the Acts of Discrimination Described.

(1) One week prior to the arrests herein, the Superintendent of Police of New Orleans, and four days prior thereto, the Mayor of New Orleans, each made clear the

intention of the City of New Orleans to protect acts of discrimination against Negroes.* In fact the Mayor went so far as to give instructions to arrest persons who peacefully sought, and hopefully awaited, service at retail stores (R. 138). At the trial, petitioner sought to introduce evidence concerning the nature of the interaction and cooperation between these public officials and the retail store owners, particularly McCrory's. The Court refused to admit testimony on this point (R. 23-27, 127).

While voluntary private adherence to a discriminatory pattern may not be violative of the Fourteenth Amendment, the act of the state, through the New Orleans officials, in advising storekeepers in advance that the Police would not permit peaceful acts such as were engaged in by petitioners, we urge is such a violation. The City tells such store owners that they should seek the assistance of the police in maintaining inequality; this thereby becomes not a matter between private parties. Both during and immediately before the acts of the petitioners, the full weight of the state was invoked in favor of discriminatory treatment of Negroes.

Had not the public authorities expressed themselves and intervened, what action McCrory's would have taken is speculative; but not unreasonably, so; one of the possibilities, because of the peaceful nature of the acts of petitioners involved, is that no call to the police would have been made, and accordingly, no arrests made.

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* These statements conformed to official state policy as expressed in Louisiana Act 630 of 1960, which in its preamble states:

> "Whereas, Louisiana has always maintained a policy of segregation of the races, and
>
> Whereas, it is the intention of the citizens of the sovereign state that such a policy be continued."

As Mr. Justice Frankfurter said in his concurring opinion in *Garner* v. *Louisiana*, 368 U. S. 157 "It is not fanciful speculation, however, that a proprietor who invites trade in most parts of his establishment and restricts it in another may change his policy when non-violently challenged."*

(2) When petitioners sought service at the white counter, the counter immediately was closed and the police called. Shortly thereafter, various policemen arrived and advised the store manager, "That we must witness his statement to them that he didn't want them in the place" (R. 125-126). The manager was thus instructed by the police to order petitioners away in their presence.

The police were called to assist and enforce McCrory's efforts to maintain segregation in food service (it is to be remembered that the practice related *only* to food service, and not other departments of the store). The police insisted on being official witnesses; after hearing the manager order petitioner to leave the *department* (R. 113), the police then ordered them from the *store* (R. 123). Thus not only were the New Orleans Police official witnesses to a private act of discrimination, but, in fact, became, by their direct intervention and order to petitioners to leave the store, principal parties to an act of discrimination. This was followed by the arrest of petitioners and the charge of violation of the criminal statute referred to placed against them.

(3) The prosecution of the case against petitioners was conducted under the aegis of the District Attorney of the Parish of Orleans.

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* The accuracy of this position is borne out by fact. The New York Times, Sept. 13, 1962, on p. 41 reported that McCrory's, among other New Orleans retail establishments, desegregated its lunch counters.

(4) While the hearing of the case by the Court, of course, does not throw the weight of the state behind the acts denying equal protection of the law to petitioners, the conviction by the judge, sitting without a jury, no less than the injunction in *Shelley* v. *Kraemer*, *supra*, becomes the act of the state. Incarceration in a jail maintained by Louisiana (which awaits petitioners if their conviction should be affirmed by this Court) is similarly no less an act of the state than the injunction in the *Shelley* case. The power to punish is the ultimate expression of state intervention.

C. Louisiana Avoided the Obligation of a State to Preserve Impartial Administration of Law.

While it may be true, as the Court below asserts, that without the will of the proprietor the state "can find no basis under the statute to prosecute", it is no less true that without the state to advise the proprietor, to arrest, to prosecute, to judge and finally to incarcerate petitioners the so-called "will" of the proprietor might not have been made known overtly in any fashion. It is also suggested that without the actions of the state, this so-called "will", described by the Court below, may reasonably have been non-existent; the problem for which petitioners presently seek relief from this Court would also be non-existent.

We urge that it is specious to suggest that in the case at bar the state is playing the role of a referee in a battle between private litigants. No disorder occurred warranting the intervention of the state. By its intervention, the state prevented a negotiated, or freely arrived at, contractual solution of the problem. It is not far fetched to say that the offer to purchase made by petitioners to

McCrory's might eventually have been accepted if the state had not acted to prevent just such an acceptance.

Whether that would have occurred in this case is not known, but clearly, intervention by the state prevented a peaceful solution, and made impossible a freely arrived at agreement in support of social progress. The acts of the state not only inhibited a peaceful concurrence but actually were in aid of social disintegration.

To pretend that the state was, as Louisiana has suggested, a neutral party in this matter is either to indulge in fantasy, or to attempt to create an air of subterfuge through which the "game" of segregation is still "played" even though the characters wear slightly different masks. The proprietor of the store plays only a small role in this charade; the main parts belong to the State. In any event the victim is the same and same jail is used.

For all the reasons we have urged, we respectfully suggest that the doctrines enunciated in *Shelley* v. *Kraemer* are directly applicable to this proceeding and the convictions should accordingly be reversed and set aside.

POINT II

Evidence adduced at the trial was not such as to sustain a conviction under the United States Constitution.

This Court has historically sought to find interpretations which uphold the constitutionality of statutes. We suggest that the Court below in affirming the convictions of petitioners, so read the statute involved here as to require that it be found unconstitutional. For, in affirming the convictions the Supreme Court of Louisiana implicitly deter-

mined that the legislature authorized in advance and supported, private acts of discrimination.

The Louisiana statute is entitled "Criminal Misch ef." In applying the facts of the instant case to that statute, it is patent from the record that no criminal mischief was in fact involved; petitioners were quiet and orderly, no evidence of any disorder by them or any others in the premises was even offered. Solely because three of the petitioners were Negroes, a lunch counter, maintained by the McCrory chain, was closed at an unusual time so as to avoid serving petitioners at a "whites only" counter. No reason was given for this action by the McCrory store other than the skin color of some of petitioners.

No reference appears in a reading of the statute, as the Court below noted, to support segregation violative of the Constitution; accordingly none should be assumed. But, the interpretation of the lower Courts, say in effect, that the Louisiana Legislature authorized acts which were beyond its competence under the Fourteenth Amendment, namely the commission of acts of discrimination against negroes.

If the state cannot commit acts of discrimination under the equal protection clause of the Fourteenth Amendment, how can it then authorize by statute the commission of such acts? We are not concerned here with a mere private right of private persons, but an affirmative act of legislation which the Court below would have us believe authorized the acts of discrimination.

Petitioners were arrested at a "white" counter. Certainly, Louisiana could not enact legislation directly making criminal the acts of petitioners here; it could not say that

negroes had no right to sit at the lunch counter in question. The Court below would have us believe, however, that despite this limitation, the Legislature could and did authorize and support by criminal penalties a subterfuge to do this very act.

This Court has ruled on several occasions that legislation enacted to maintain segregation is unconstitutional. This is so whether it is in a public facility or involves a private activity. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 721.

If the Court below is correct, this Court is being urged to permit subterfuge to justify and uphold the performance of activity which clearly is otherwise illegal. For whether by legislation that says "no negroes may sit at white lunch counters", or by interpreting a statute so as to cause it to read *as if* it said that, the result is exactly the same, segregation is maintained and persons are convicted of committing a crime, without engaging in any act other than sitting peacefully at a lunch counter.

We suggest that the improper interpretation of the statute of the Court below requires a setting aside of the convictions herein on the grounds that there is nothing in the legislation in question which authorized the convictions or their affirmance.

The often-quoted language in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 374 is particularly apropos here:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial

> of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor etc. of New York*, 92 U. S. 259 (Bk. 23, L. ed. 543); *Chy Luny* v. *Freeman*, 92 U. S. 275 (Bk. 23, L. ed. 550); *Ex parte Va.* 100 U. S. 339 (Bk. 25, L. ed. 676); *Neal* v. *Delaware*, 103 U. S. 370 (Bk. 26, L. ed. 267); and *Soon Hing* v. *Crowley* (*supra*)."

La. R. S. 14:59(6), even if it is constitutional, has been arbitrarily, capriciously and discriminatorily applied and administered unjustly and illegally, and only against persons of the Negro race or white persons acting with members of the Negro race. Such unequal application of the law cannot be excused by a pretense that the law, as written, does not require unequal treatment.

POINT III

The use of the public force to protect property is limited by the equal protection clause of the Fourteenth Amendment.

The Fourteenth and Fifth Amendments protect private property so that it may not be taken without due process of law. In them, limitation is set on the exercise of both the federal and state power.

Much has been written as to the nature and philosophy of property and possession. Justice Oliver Wendell Holmes in the chapter on possession in his renowned volume on the COMMON LAW and Professor Morris R. Cohen in LAW AND THE SOCIAL ORDER are amongst our finest commentators as to the nature of property and its limited uses.

Professor Cohen in the essay on property in LAW AND THE SOCIAL ORDER discusses property as being a legal right granted to an individual to exclude others from its use.

Justice Holmes at page 214 of the 45th edition to the COMMON LAW stated it in these terms. "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right . . ."

McCrory's, possessing the legal right to the use of property, chose voluntarily to open its property at busy Canal and Burgundy Streets to the public for the sale of numerous kinds of goods and services. It could have excluded, by virtue of its right, all persons from that property; it chose rather to put it to a business use. Now it calls upon the public force to aid it in effectuating an admitted act of discrimination and segregation, an act which if committed by the state directly would clearly violate the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority, supra.*

At this point the issue is not whether private acts of discrimination violate the Fourteenth Amendment, but whether the public force may be used to maintain and support acts of segregation. Certainly the public force may not directly impose segregation and many cases to that effect have been decided by this Court. Then wherein lies the difference, unless we presume a blind and deaf public power.

The Court in *Shelley* v. *Kraemer* stated at page 22, "The Constitution confers upon no individual the right to

demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

In this case the issue is not whether McCrory's must or must not serve petitioners, not whether they may or may not select clientele, but whether or not they may ask the public force to assist them in a refusal to serve persons based upon their color. As we perceive it, the issue is not the private right of McCrory's, but the use of the public force "which results in the denial of equal protection of the laws to other individuals."

Justice Holmes stated that the legal right resulting from the possession of property bears the related right to call upon the public force; but the use of that force is limited by the restrictions of the Fourteenth Amendment and the equal protection clause. This is a reasonable inference to be drawn from the statement from *Shelley* v. *Kraemer, supra,* quoted above.

There is no neutral protection of property rights in such a matter as before this Court. We are not concerned with the traditional duty of the police to maintain order, to protect people in their homes or to direct the flow of traffic. This property located at Canal and Burgundy Streets in the heart of downtown New Orleans was no person's home, nor was there any showing of any public disorder. The only untoward act occurred with the closing of the lunch counter at 10:30 A. M. by the manager of the department due to the presence of Negroes.

Pretense, sham and subterfuge do not create respect for the law, and do not obtain compliance with the law. To pretend the police merely protected a property right, one must pretend that no more was involved in the arrest of petitioners. Laws must be based on honesty and reality, not deception and inequality. Property rights were not the subject of protection by the police though the pretense was such, but rather the unequal, immoral, degrading institution of segregation was the beneficiary of the law's bounty.

It is no derogation of the right of private property to say it cannot call upon the public force to protect it from a use in violation of the United States Constitution. In many ways the uses of private property are limited. For example, zoning ordinances clearly limit the freedom of use of property.

In Louisiana, Civil Code Articles expressly limit property rights, as for example:

> Article 490. Ownership is divided into perfect and imperfect. . . .
>
> Article 491. Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances. . . .
>
> Article 667. Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

We respectfully urge as the Court stated in *Shelley* v. *Kraemer* (*supra*), that a private owner cannot call upon

the public force to maintain an inequality in the protection of the laws; similarly it is violative of the Fourteenth Amendment for the public force to respond in support of such improper call. Accordingly, we urge the setting aside of the convictions for this reason.

POINT IV

The Constitutional right of petitioners freely to assert opposition to segregation is a right that should have been protected by the State in the case at bar.

Petitioners' presence at the lunch counter was a form of expression, a means of communication; in the broad sense, it was "speech."

"Speech" protected by the United States Constitution includes modes of expression other than by voice or by press. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, *Thornhill* v. *Alabama*, 310 U. S. 88, 106.

Petitioners' act in sitting quietly in a place of business, for the purpose of expressing disapproval of a policy of racial discrimination practiced there constituted a form of speech. As such, it is protected against interference by the State.

"The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." *Schneider* v. *State*, 308 U. S. 147.

When agents of the state (police officers, the District Attorney, the District Judge) arrested, charged and tried

petitioners under La. R. S. 14:59(6), thereby preventing them from continuing their expression of disapproval of racial discrimination by the management of the lunch counter, the state deprived them of an element of liberty guaranteed to them under the Fourteenth Amendment against such state action.

Hence, even if it be conceded *arguendo* that the statute might be constitutionally enforced in other circumstances, it may not be so when its enforcement limits a form of communication of ideas, as has been done in the present instance. Rather than being arrested for their expression of opinion, petitioners had a right to expect police protection to preserve order. *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir.) *cert. denied*, 332 U. S. 851.

Complex as our society is, it is inevitable that various interests will come into conflict. It is not unusual for this Honorable Court to consider a right such as free speech weighed against other rights. *Schneider* v. *State*, 308 U. S. 147; *Thomas* v. *Collins*, 323 U. S. 516.

Freedom of speech was inhibited by the state herein. It can hardly be denied that the act of petitioners was an act of speech, asserting the right of equality for all citizens, black or white. The act of the state in limiting this assertion must be examined by the Court to see what interest of the state needed protection to warrant the interference with speech. *W. Va. State Bd. of Education* v. *Barnette*, 319 U. S. 624, 639.

There was no imminent danger to the state which required protection, and which demanded the limitation of speech. *Thornhill* v. *Ala.*, *supra*. In passing the statute

under which petitioners were charged, there was no substantive evil threatened requiring the denial of the right to peaceful, free assertion or speech. *Schenck* v. *U. S.*, 249 U. S. 47.

It has always been the view that rights under the First Amendment (and protected from infringement by the state under the Fourteenth) are preferred rights, and the usual presumption in favor of validity of legislation is not present with respect to laws limiting such rights. *Thomas* v. *Collins*, 313 U. S. 516; *Schneider* v. *State*, 308 U. S. 147.

No right of the state at all is alleged; at most, merely the right to refuse service to Negroes by privately owned storekeepers is involved. Not only was no disorder shown to have existed, no assertion of any loss to McCrory's was made. Weighed against the peaceful exercise of speech by petitioners is an act of discrimination not only immoral in itself, but legally de minimis, and almost frivolous as compared with the right of protest against such discrimination.

The state was not presented with a street brawl where its duty would be to maintain order neutrally, but rather with two assertions of right. However it acted, one right or the other had to be subordinated. When such are the conditions, the choice must support the highly protected Constitutional right of freedom of speech.

POINT V

Restaurants are a business affected with a public interest wherein segregation may not be enforced.

In *Garner* v. *Louisiana*, 368 U. S. 157, Mr. Justice Douglas, in his concurring opinion, pointed out that Louisiana restaurants are required to have a license. La. R. S. 47:353, 362. Local Boards of Health may provide means for public health. La. R. S. 40:32, 35. Ordinances of the City of New Orleans include the requirement that persons selling food must have a permit. New Orleans City Code, 1956, §29-55, 56. Thus the State has more than a casual concern in such matters in order to protect the public interest.

Whatever the issues are in other businesses, the state has shown its special interest in restaurants by licensing them. Almost by definition this becomes a business affected with a public interest.

"The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it (*Marsh* v. *Alabama*, 326 U. S. 501).

With McCrory's open to the public in the manner it is, we urge that it has become so affected with a public interest as to require the application of the Fourteenth Amendment.

Nor can the protections of that Amendment be bypassed by resort to charging some members of the public with trespass when they enter the open doors of such an establishment. The concept of trespass in a publicly

licensed business operated in the open manner in which this store functions is almost self-contradictory.

The absurdity of the idea of trespass by these petitioners becomes more apparent when we examine the testimony and find that Negroes are welcomed at all counters but the one in question.

Since the events herein took place in a publicly licensed restaurant opened to the public at large, the acts of discrimination were committed by a business affected with a public interest; such being the case the limitations and obligations of the Fourteenth Amendment apply (*Marsh* v. *Ala., supra*), and the convictions should be reversed as a denial of equal protection.

POINT VI

Refusal by trial judge to admit evidence to establish actual concert between McCrory's and the police violated petitioners' right to a fair and impartial trial as guaranteed by the Fourteenth Amendment.

The refusal of the trial judge to admit testimony showing actual concert between the store proprietor and the police violated petitioners' right to due process of law guaranteed by the Fourteenth Amendment (R. 22-25).

The expression of policy by the Mayor and the Superintendent of Police of the City of New Orleans (R. 138-9) operated as a warning to all members of the Negro race not to seek service at lunch counters whether or not the proprietor was willing to serve them. The pronouncement of policy by the leaders of the municipal authority operated also as notice to proprietors of business establishments not

to serve Negroes at "white" counters at the risk of suffering municipal censure or punishment.

Under the *Civil Rights* cases, *supra*, to show state participation it was important that defendants prove concert between the store manager and the police. This was relevant evidence, the exclusion of which was prejudicial to the petitioners as it limited their right to show that they were the victims of prohibited state action rather than of a protected personal act of the proprietor.

Conclusion

For all of the reasons set forth above, we respectfully urge that the convictions of petitioners, and the affirmance thereof, be reversed and set aside.

Respectfully submitted,

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